IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 244 of 1996

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

SHAIKH LALA SHAIKHBABU - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

==========

Appearance :
MR SHAKEEL A QURESHI for Appellant(s) : 1,
MR.A.J.DESAI, ADDL.PUBLIC PROSECUTOR for Opponent(s) : 1,

==========

CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 01/02/2007

ORAL JUDGMENT

By present appeal, the appellant (original accused)of Sessions Case No.262 of 1993 assailed the legality and validity of the order of conviction and sentence passed by the learned

Additional Sessions Judge, Surat dated 6th February, 1996. The impugned judgment is assailed on various grounds mentioned in the memo of appeal.

2. Mr.Qureshi, learned Advocate appearing for the appellant has taken me through all the grounds. He has taken me through the oral as well as documentary evidence during the course of trial and submitted that the order of conviction and sentence is bad and therefore, the same requires to be set aside.

3. On the other hand, learned A.P.P., Mr.Desai, has pointed out the major aspects considered by the learned trial Judge. According to him, the order of conviction and sentence is absolutely legal and no error has been committed either factually or legally in arriving at ultimate finding of conviction. The sentence imposed by the learned Judge is in reference to the quantity of prohibited substance found and therefore the judgment does not require to be

interfered with.

4. To appreciate the rival side contentions, firstly it would beneficial to state the prosecution case in brief. As per the complaint registered with Limbayat Police Station, City Surat being C.R.No.III-650 of 1993, the Police had received secret information that the accused is keeping and selling the prohibited substance viz. Ganja in his residential house situated at Mithi Khadi area, Opp. Nurani Mosque, Limbayat. On receipt of the information on 4/8/1993 the residential house of the accused was raided at about 21:30 hours and prohibited substance Ganja weighing about 8 Kg. And 200 Grams was recovered, valued at Rs.4,100/-. The prohibited substance Ganja was recovered in the presence of Panchas and the same was sealed in accordance with the prescribed procedure, after taking out some substance i.e. sample for sending the same to F.S.L. Examination. It was found that substance found and seized by Police was Ganja and therefore the accused was charge sheeted for the

offence punishable under Section 20 (b) (i) of the Narcotics Drugs and Psychotropic Substance Act (hereinafter referred to as the **'N.D.P.S. Act'**). It is alleged that at the time of raid, the accused was a sole person present in the house and the muddamal Ganja has been recovered during the search of the house. Out of total quantity of prohibited substance, 7 Kg. And 800 Gms. ganja was lying under iron-cot with some other household articles in polythene bag and 400 gms of Ganja was found in 81 separate packets which were kept in a transparent polythene bag. This transparent polythene bag was found hanged on the back portion of the door.

5. On plain reading of the evidence oral as well as documentary, so also the arguments advanced before the learned trial Judge, it appears that the accused had intended to take the technical defence provided under Section 50 of the N.D.P.S. Act. It was also argued before the learned trial Judge that mandatory provision of Section 42 has not been followed and the Raiding

Officer had not even cared to inform the immediate Superior Officer and raid was carried out in absence of a Gazetted Officer.

6. Having considered the rival side contentions and especially the scheme of Section 42, as well as, Section 50 of N.D.P.S. Act in the background of the recent decision, Mr.Qureshi has fairly submitted that he does not press the appeal so far as conviction recorded by the learned trial Judge is concerned. However, the accused should have been heard thoroughly on the point of quantum of punishment. According to him, the punishment imposed by the learned trial Judge can be said to be harsh and unwarranted and therefore, it requires to be reduced substantially and this Court by enhancing the amount of fine to some extent, atleast should reduce the substantive punishment. It is true that according to Mr.Qureshi one should feel that a large quantity of prohibited substance 'cannabis (hemp)' had been recovered from the place but the Court while considering this aspect

should see the recent provision made in the amended N.D.P.S. Act where the legislature has prescribed the commercial quantity so far as prohibited substance Ganja is concerned. Today this substance upto 20 Kg. is considered to be a quantity less than commercial and 1 Kg. Quantity of prohibited substance is considered to be a small quantity so the accused if is held guilty under the recent legislation for possessing Ganja upto 1 Kg., he would be sentenced for the period of six months and under the relevant law when the accused was prosecuted one could not be convicted for more than five years even if he is found with possession of Ganja of the quantity of 100 Kg. The learned Judge ought to have considered that three years imprisonment would be harsh especially when the muddamal seized was inclusive of other particles i.e. flowers on tops of cannabis salavia.

7. In the present case the accused was found possessing much less than half of the quantity of prohibited substance-Ganja than the commercial

quantity prescribed / considered by Amended N.D.P.S. Act in force. The commercial quantity has been determined by the Government under a Notification and therefore for Ganja the commercial quantity would be 20 Kg. today. At present the accused is enjoying the bail. The matter is very old and amount of fine of Rs.10,000/- has been paid by the accused. Ultimately the learned trial Judge has accepted the contention canvassed, when he was heard on the point of quantum of punishment, that he was young man of about 32 to 35 years and is having five children to maintain; there are no other criminal antecedents; he was selling vegetable by running hawker and while deciding the amount of fine the Court has considered all these aspects. However, the substantive sentence is imposed for three years atleast that should be reduced substantially. Accused has remained in jail for about four months and therefore the Court by enhancing the amount of fine should pass order awarding sentence already undergone by giving set off of the period for which the appellant-accused

had remained in jail .

8. There is strong resistance from learned A.P.P., Mr.Desai. According to him the quantity of prohibited substance was obviously large. The commercial quantity prescribed by the Government under recent Notification under N.D.P.S. Act should not considered as relevant and if it is considered relevant and as there was no minimum punishment prescribed under the relevant N.D.P.S. Act when the accused was found with conscious possession of the contraband substance, then the Court should not reduce the period of imprisonment for less than one year. Even though, the matter is old, the accused shall have to go to prison otherwise the entire order of conviction and punishment would get frustrated. The society has commitment to curb the illegal storing, selling and trafficking of prohibited substance. He also submitted that amount of fine should be increased to Rs.25,000/- if the substantive sentence is to be reduced.

9. Having considered the above submissions and facts emerging from the record vis-a-vis two different schemes of N.D.P.S. Act; one at the relevant point of time and the other being the recent policy of the Government under the amended N.D.P.S. Act and the notification, the Court finds some force in submission of Mr.Qureshi. The quantum of punishment for three years can be said to be harsh and therefore it requires to be reduced by increasing the amount of fine and the substantive punishment can be reduced and should be reduced. Therefore, as submitted by Mr.Desai, that substantive sentence should not be reduced to the period less than one year so it cannot be said that substantive sentence can be reduced to one year instead of three years imposed by the trial Court and the amount of fine if doubled to Rs.20,000/- then it would meet the ends of justice.

10. The accused has already paid amount of fine of Rs.10,000/-. However the Court obviously shall have to say what will be the punishment in

default of payment of fine. It is prescribed to one year. If the same is prescribed to one year, it would be balancing. Obviously the accused shall be entitled to set off as per scheme of Section 428 of the Criminal Procedure Code.

11. As the conviction has not been challenged and the arguments have been made on the point of quantum of punishment, the Court is inclined to allow this appeal in part.

12. In the result, present appeal is hereby partly allowed. While confirming the judgment and order of conviction dated 6th February, 1996 rendered by the learned Additional Sessions Judge, Surat in Sessions Case No.262 of 1993, the order of sentence is hereby altered.

12.1 The appellant-accused is ordered to undergo the substantive sentence for the offence punishable under Section 20 (b) (i) of the N.D.P.S. Act, of rigorous imprisonment of one year instead of three years and is ordered to pay

a fine of Rs.20,000/-, instead of Rs.10,000/-, in default thereof, to undergo simple imprisonment for one year. The accused shall surrender before the concerned trial Court to serve the sentence within 06 (six) weeks from today; failing which the concerned learned trial Judge shall issue non-bailable warrant against the appellant-accused to serve the sentence.

12.2 Bail Bond of the appellant-accused shall stand cancelled. Order and Direction accordingly.

(C.K.BUCH, J.)

sompura